

## **2. Clearly Articulated and Predetermined Measures**

### ***a. Measure Selection Process***

The Performance Indicator Definitions (PID) document setting forth wholesale performance measures was developed through a collaborative process involving Qwest, CLECs, and state commission personnel under the ROC Operational Support Systems (OSS) process. The PEPP collaborative included negotiations to determine which PID performance measures should be included in the QPAP. Qwest subsequently agreed to add two additional diagnostic measures and to include a number of other measures not addressed at the PEPP collaborative.

The facilitator stated that no participant at the QPAP workshops disputed that the PEPP collaborative sought to achieve a broad set of measures to include in the QPAP's payment structures. The issue in dispute essentially was about whether substantial grounds existed for including additional measures. The next sections of the facilitator's report discussed the merits of adding to those measures.

The NDPSC agrees with the facilitator's conclusions.

### ***b. Adding Measures to the Payment Structure***

#### ***(i) Requiring Payments for Canceled Orders***

Some CLECs recommended that the QPAP provide payments for cancelled orders in certain circumstances, arguing that a CLEC's loss of a customer was both significant economically and not otherwise compensated under the QPAP payment structure. Qwest responded that it cannot be fairly held responsible for all reasons why CLECs cancel orders.

The facilitator found that the conditions that should be met, before deciding that added compensation to CLECs for cancelled orders is necessary to make CLECs whole, had not been shown to exist. CLECs presented no evidence to demonstrate the strength of the relationship between Qwest's performance and cancelled orders. Indeed, there was not evidence to demonstrate that cancelled orders, whatever the reason, are material in number. There was also no apparent way to craft a provision that would exclude compensation for CLEC decisions to cancel for end user decisions to cancel or for reasons unrelated to performance. The CLEC's proposing this measure offered no specific proposal for doing so. The facilitator found that the QPAP already provides for compensation for delays during the period in which orders remain open, whether or not they are finally cancelled. The facilitator concluded that the QPAP will serve to compensate CLECs adequately for delays in processing orders, *whether or not* those orders are ultimately filled.

The NDPSC agrees with the facilitator's findings and conclusions.

### ***(ii) Requiring Payments for "Diagnostic" UNEs***

The QPAP provides for payments in the case of poor performance for loops and transport but none exist for EELs, which are a combination of the two. The PID applies no benchmark or parity standards to EELs at present; the performance measures related to them are diagnostic in nature. Line sharing and sub-loops are also currently excluded from the QPAP payment structure, because the performance measures for them are diagnostic. Qwest's brief acknowledged that as the ROC OSS collaborative changes measures from diagnostic to a firm benchmark or parity standard, they would be included in the QPAP.

The facilitator recommended that as EEL ordering activity increases, this measure should be subjected as soon as practicable to a measurement base that will allow for its prompt addition to the payment structure of the QPAP. Likewise, the use of a diagnostic standard reflects the fact that experience with line sharing and sub-loop elements was too limited to support a benchmark or parity standard. They should also be included in the QPAP structure as soon as is practicable.

The NDPSC agrees with the facilitator's findings and conclusions.

### ***(iii) Cooperative Testing***

Covad recommended a cooperative testing performance measure as the most effective means of minimizing trouble reports for the xDSL UNE loops that it takes from Qwest. Qwest said that Covad failed to raise the cooperative testing issue at the PEPP collaborative; nor was it raised when the ROC OSS collaborative designed the performance measures set forth in the PID.

The facilitator determined that while it should not be possible to meet a service order's requirements by supplying a defective or nonconforming UNE, the record does not indicate how direct and efficient it would be to create a cooperative testing measure that would provide for effective performance measurements and not duplicate the payments to be obtained under existing installation or repair measures. While it stands to reason that it is better to prevent and detect problems at the earliest possible point, the facilitator found that the failure of Covad to raise this issue earlier means that we do not have a sound basis for concluding that Covad's approach would be preferable. The facilitator recommended that Covad should raise this issue in the forum where new or changed performance measures are identified, discussed, and resolved.

The NDPSC agrees with the facilitator's findings and conclusions.

### ***(iv) Adding PO-15 D to Address Due Date Changes***

Covad also argued that performance measure PO-15D, which measures the number of due date changes per order, should be included in the Tier 1 payment structure.

The facilitator recommended no solution to Covad's concern because Covad offered no recommendation for what that standard should be and because a diagnostic measure cannot provide a payment calculation basis.

The NDPSC agrees with the facilitator's findings and conclusions.

***(v) Including PO-1 C Preorder Inquiry Timeouts in Tier 2***

AT&T commented that performance measure PO-1C should be separately included as a Tier 1 payment item. This measure calculates the number of inquiries that "timeout." Such an event ceases the query function underway, thus requiring CLEC representatives to initiate it again.

The facilitator found the QPAP already provides for compensation for measures PO-1A and PO-1B, which measure response times. There was a logical basis for excluding PO-1C, which is a percent measurement, from the duration measurements that were included in Tier 1. The facilitator found that the QPAP's treatment of the overall measurement reflects a proper treatment of the issue of response times for the present. Incorporating sub-measure 1C would take more information and analysis than the current record supports. The facilitator recommended that given all the circumstances, it is reasonable to construe the PAP collaborative agreement as intending not to include 1C separately; moreover, the facilitator found no reason to disturb that agreement as it has been interpreted. Should the OSS testing demonstrate a high number of timeouts to give concern about the impact on PO-1A and 1B response times, it would be appropriate to revisit the issue.

The NDPSC agrees with the facilitator's findings and conclusions.

***(vi) Adding Change Management Measures***

Covad wanted to add change management performance measures to the QPAP. Qwest had agreed that it would add two change management measures, GA-7 (Timely Outage Resolution) and PO-16 (Release Notifications). Those measures are now diagnostic, but would be included as "High" Tier 2 measurements after the ROC OSS collaborative establishes benchmark measures for them.

The facilitator recommended it is appropriate to include the measures as Qwest proposed after benchmarks are established.

The NDPSC agrees with the facilitator's findings and conclusions.

***(vii) Adding a Software Release Quality Measure***

WorldCom argued that the propriety of adding a proposed software release quality measure should be reviewed at the QPAP's first six-month review. Qwest

objected to the addition of a software release quality measurement, which the ROC OSS Steering Committee had recently rejected adding to the PID.

The facilitator found that no participant sought the inclusion of the measure at this point but only to address it under established QPAP review procedures. The arguments in support and against the measurement can be raised in the context of the established procedures for addressing PID and QPAP changes.

The NDPSC agrees with the facilitator's findings and conclusions.

***(viii) Adding a Test Bed Measurement***

WorldCom asked that a Test Environment Responsiveness measure be included in the QPAP payment structure after its adoption. Qwest said it was premature to discuss WorldCom's suggested test bed measurement. Qwest presented evidence that the proposed measure was being "vigorously disputed" and that Qwest's current proposal under discussion at the ROC OSS collaborative specifically provided that the measure would remain diagnostic until the 6-month review.

The facilitator determined it was premature to express opinions about the future inclusion of a measure that is in this state of development and there should be no presumption for or against its eventual inclusion in the QPAP under the applicable procedures for modifying the plan.

The NDPSC agrees with the facilitator's findings and conclusions.

***(ix) Adding a Missing-Status-Notice Measure***

WorldCom also proposed adding to the QPAP payment structure a performance measure based on the missing status notice measure adopted in New York. Qwest noted this measure was not proposed for inclusion during the PEPP collaborative and currently exists in the PID only in diagnostic form.

The facilitator recommended no proper basis was laid for establishing here a measure designed to respond temporarily to circumstances existing in New York. Its inclusion may be requested later and in accordance with applicable procedures for modifying the plan.

The NDPSC agrees with the facilitator's determinations and recommendations regarding adding measures to the payment structure.

***c. Aggregating the PO-1A and PO-1B Performance Measures***

Qwest said the PEPP collaborative reached agreement on collapsing the seven individual measurements under PO-1A (response times for transactions under the IMA-GUI) and PO-1B (response times for the same transaction types under EDI) into two

that would be subject to QPAP compensation, by averaging the response times for all seven PO-1A measures and all seven (and identical) PO-1B measures. AT&T argued at the QPAP workshop hearings that the collapse intended was to aggregate each of the PO-1A measures with their PO-1B counterparts, thus producing seven compensable QPAP measures. AT&T said that Qwest's interpretation of the agreement would allow Qwest to mask poor performance in certain transaction types.

The facilitator determined that Qwest will still be required to report performance under each of the seven transaction types and for each of PO-1A and PO-1B. The real issue, therefore, is not about masking performance but the reasonableness of combining the types of transactions into a single payment "opportunity." The facilitator found that the AT&T recommended QPAP payment exposure appears to be out of balance with the Tier 2 payment amounts for other filings. Also, the AT&T approach would have the greatest tendency to mix unrelated performance types. The facilitator stated that the evidence shows the agreement reached at the PEPP collaborative was on the terms represented by Qwest and those terms established significant and more balanced payment responsibilities for failure to meet standards.

The NDPSC agrees with the facilitator's determinations regarding aggregating the PO-1A and PO-1B Performance Measures.

#### ***d. Measure Weighting***

##### ***(i) Changing Measure Weights***

Some CLECs requested that the weighting (and therefore the QPAP payment amounts) be increased for certain high-capacity loop (DS1 and DS3) measures. Qwest agreed to do so, but it then dropped the weighting and corresponding payment amounts for other services, such as residence resale, to compensate. AT&T argued it was appropriate to increase the high capacity measures, but not to decrease any others in response. According to AT&T, Qwest's proposal would significantly drop its overall payments under the QPAP.

The facilitator determined that conceptually, there was no error in Qwest's efforts to rebalance payments among measures as a way of responding to AT&T's request for a higher weighting on certain services of value to AT&T. The facilitator recommended that given the opposition to what Qwest did to meet AT&T's stated needs, and given a concern that Qwest may have overcompensated, the best course is not to make either the weighting increases or the weighting decreases that Qwest offered to address AT&T's concern. No other reasonable proposal being made or accepted, the facilitator recommended the weights should return to those proposed in the QPAP that Qwest initially filed in these proceedings.

The NDPSC agrees with the facilitator's findings and conclusions.

### ***(ii) Eliminating the Low Weighting***

Some CLECs argued that no measure should have a low weight; all should be at least a medium, and some should move from medium to high. Qwest said these changes would not improve the QPAP, but merely provide increased payments to CLECs.

The facilitator found little support was provided for these requested changes. Also, some of the requested changes would suffer from the same balance problem that was addressed in the immediately preceding section of this report. The facilitator recommended that the three categories of weights that came out of the PEPP collaborative process should remain.

The NDPSC agrees with the facilitator's findings and conclusions.

### ***(iii) LIS Trunks Weighting***

AT&T argued that LIS trunks should be considered as particularly high value services, which therefore should carry higher non-performance payments. Qwest argued the trunk blocking measure already provides payments in cases where Qwest cannot provision incremental trunks on time.

The facilitator determined that trunk blocking, as opposed to an inability to take on new customers, is the more common issue. In that regard, orders for incremental LIS trunks are not categorically different from other services that Qwest may be slow to deliver. The facilitator recommended that the QPAP payment structure already reflects an adequate treatment of measure weights and no further changes are needed.

The NDPSC agrees with the facilitator's recommendations regarding measure weighting.

### ***e. Collocation***

The New Mexico Advocacy Staff proposed either the Michigan or the Georgia approach to determining collocation payment amounts. Qwest commented that the CLECs represented during a May PEPP collaborative workshop that their proposal did reflect the Michigan approach.

The facilitator found the collocation proposal whose acceptance Qwest acknowledged at the hearings was both based on the Michigan proposal and acceptable to the CLECs who responded to it. The facilitator recommended there was no reason to question the QPAP's treatment of collocation payments.

The NDPSC agrees with the facilitator's recommendation regarding collocation.

#### ***f. Including Special Access Circuits***

CLECs requested that special access circuits be included in the PID performance measures as one of the product disaggregations, and that the QPAP be changed to provide for payments associated with such circuits. Qwest said there had been agreement to drop special access circuits from discussions by the ROC OSS collaborative that designed the PID, because section 251 did not include them. Qwest also said that special access circuits cannot be considered a checklist item at all, according to the FCC and a number of state commissions.

The facilitator determined that special access circuits do not merit the treatment recommended by the CLECs. The overwhelming majority of special access circuits at issue were purchased under federal tariffs. Remedies for failure to meet the requirements of state and federal tariffs should be addressed by the agencies with jurisdiction over such tariffs. Prior workshop recommendations, and Qwest's response, provided for substantially eased restrictions on the conversion of special access circuits to EELs which makes it possible for CLECs to bring services under the terms and conditions of an interconnection agreement or an SGAT, should they elect to do so. In that case, CLECs would have all the rights and expectations applicable to those agreements. The facilitator did not recommend changes to the QPAP.

If the FCC has stated that special access circuits cannot be considered a checklist item, the NDPSC would agree with the facilitator's recommendation that special access circuits should not be included in the PID performance measures or the QPAP payments.

#### ***g. Proper Measure of UNE Intervals***

Covad argued that QPAP payments should be based on the intervals of SGAT Exhibit C, rather than on the intervals set forth in the PID. Qwest responded that there is a logical relationship between SGAT Exhibit C and the PID performance measures.

The facilitator found there is consistency between the PID performance measures and SGAT Exhibit C. For the reasons stated in the facilitator's report of August 20, 2001, it is appropriate for the QPAP to apply the PID performance measures, not SGAT Exhibit C, as the payment standard.

The NDPSC agrees with the facilitator's determination regarding the proper measure of UNE intervals.

#### ***h. Low Volume CLECs***

Covad argued that Qwest designed the QPAP primarily to compensate high-volume CLECs; with the result that lower volume CLECs will be under-compensated. Qwest disagreed that the QPAP's reliance upon per-occurrence compensation structure

would disadvantage CLECs with small wholesale-service volumes. Covad also objected to the QPAP provision that would provide Qwest with "one free miss" each month in the case of CLECs with small order volumes. Qwest defended this provision as a necessary adjustment to provisions that would make its performance standard one of perfection in the case of very small order volumes, because even one miss would put Qwest below the required level of performance.

The facilitator agreed that Qwest provided substantial evidence that the QPAP would not serve to under-compensate smaller volume CLECs. It could not be demonstrated that there was any disturbing correlation between QPAP payment levels and QPAP order volumes, thus disproving the claim that there would be relative under compensation to those with lower order volumes. Regarding the "free miss" issue, the facilitator determined a rolling average applied yearly would serve much better to correct the problem of rounding for low volume CLECs. To address the issue of escalating payments for consecutive month misses, the facilitator recommended the escalation provision should be applicable in any month where any miss occurred for CLECs with low volumes at the level in question, and where the annual escalation shows violation of the applicable requirement. The facilitator recommended the QPAP should incorporate these changes.

The NDPSC agrees with the facilitator's recommendation. In its post-hearing memorandum, Qwest proposed the following changes to QPAP Section 2.4 in response to the Commission's request to address this issue:

*For performance measurements that have no Qwest retail analogue, agreed upon benchmarks shall be used. Benchmarks shall be evaluated using a "stare and compare" method. For example, if the benchmark for a particular performance measurement is 95% or better, Qwest performance results must be at least 95% to meet the benchmark. Percentage benchmarks will be adjusted to round the allowable number of misses up or down to the closest integer, except when a benchmark standard and low CLEC volume are such that a 100% performance result would be required to meet the standard and has not been attained. In such a situation, the determination of whether Qwest meets or fails the benchmark standard will be made using performance results for the month in question, plus a sufficient number of consecutive prior months so that a 100% performance result would not be required to meet the standard. For purposes of section 6.2, a meet or fail determined by this procedure shall count as a single month. In cases where there is insufficient prior data to determine if the standard has been met or missed using this "look-back" procedure, Qwest shall be allowed to round the product of the benchmark and the sample size up to one, such that one miss would be permitted.*

The NDPSC agrees with the language proposed by Qwest for inclusion in the QPAP.



The NDPSC finds that Qwest, in its North Dakota SGAT Sixth Revision dated May 30, 2002, has made the changes to QPAP Section 2.4 as recommended by the NDPSC.

### **3. Structure to Detect and Sanction Poor Performance as it Occurs**

#### ***a. Six-month plan review limitations***

Section 16 of the QPAP provides the means for amending the plan and allows for the following changes:

- Addition, deletion, or change of measurements (based on whether there has been an omission or failure to capture intended performance)
- Change of benchmark standards to parity standards (based on whether there was an omission or failure to capture intended performance)
- Changes in weighting of measurements (based on whether the volume of "data points" was different from what was expected)
- Movement of a measure from Tier 1 to Tier 2 (based on whether the volume of "data points" was different from what was expected)

The section requires any change to the QPAP to be approved by Qwest. AT&T proposed that all aspects of the plan be open to review at the six-month reviews and would rest authority for deciding to accept any changes with this Commission. AT&T would also eliminate the number of data points as the sole basis for determining performance measure reclassifications and would take away Qwest's veto power over QPAP changes while allowing more extensive PID review. Qwest objected to an obligation to open the QPAP generally to amendment, because of its need to have certainty about the extent of the obligations it was agreeing to undertake. Qwest also said that effective administration of the plan required a substantial degree of stability in its provisions. The QPAP limits on the scope of the six-month review also reflect the same provisions included in the Texas PAP existing as of FCC's Texas 271 decision.

The facilitator determined the Texas PAP is, in almost all respects, consistent with what Qwest has proposed. One material difference is that the question related to the addition of new measures may be resolved by arbitration. The facilitator found that prior recommendations that total financial liability remain predictable, and thus fixed, were appropriate and addressed Qwest's concern when it comes to matters of a payment ceiling. The facilitator found, however, that the Texas arbitration provision is appropriate to assure that the QPAP meets the applicable standards without unduly exposing Qwest to indeterminate increases in its financial exposure. The facilitator recommended that with the following changes, the QPAP provisions could function effectively to respond to external changes, without creating insufficiently defined financial exposure to Qwest:

- Provide for normal SGAT dispute resolution procedures in the event there is disagreement with a six-month review process recommendation

regarding proposed addition of new measures to the QPAP payment structure.

- Recognize and support multi-state efforts (should they occur) to create a Tier 2 funded method and a regular administrative structure for resolving QPAP disputes.
- Provide for biannual reviews of the QPAP's continuing effectiveness for the purpose of allowing state commissions to regularly report to the FCC on the degree to which there are adequate assurances that Qwest's local exchange markets remain and can be expected to continue to remain open.

The NDPSC finds that Qwest has included language in its QPAP at Sections 16.1, 11.3 and 16.2 that is consistent with the facilitator's recommendations.

AT&T is concerned that Qwest maintains too much control in the six-month review because the QPAP provides that changes cannot be made without Qwest approval and there is no provision for the NDPSC to be the ultimate determiner of contested issues.

The NDPSC agrees with the facilitator's recommendations regarding 6-month plan review limitations except the NDPSC recommends that Qwest remove from the QPAP the language that "Changes shall not be made without Qwest's agreement, except that".

QPAP Section 16.1 sets forth the recurring six-month review of the performance measurements. QPAP Section 16.2 sets forth the two-year review by an independent third party of the effectiveness of the PAP. As noted earlier, the NDPSC agrees that state commissions should be able to join with other states to oversee the QPAP auditing function in a manner that allows each state to act independently on issues where it might differ from other states. However, the NDPSC believes that it should be able to perform those functions on its own or in the absence of a multistate oversight body. The NDPSC recommends that the QPAP Sections 16.1 and 16.2 be changed to the following:

*16.1 Every six (6) months, beginning six months after the effective date of the first Section 271 approval by the FCC of one of the states that participated in the multi-state QPAP review proceeding, Qwest, CLECs, and the Commission shall review the performance measurements in the QPAP to determine whether measurements should be added, deleted, or modified; whether the applicable benchmark standards should be modified or replaced by parity standards; and whether to move a classification of a measurement to High, Medium, or Low or Tier 1 to Tier 2. The criterion for reclassification of a measurement shall be whether the actual volume of data points was less or greater than anticipated. Criteria for review of performance measurements, other than for possible reclassification, shall be whether there exists an omission or failure to capture intended*

*performance, and whether there is duplication of another measurement. Any disputes regarding adding, deleting, or modifying performance measurements shall be resolved by the Commission. The NDPSC retains the right to add topics and criteria to the six-month review, retains the ability to order changes if the QPAP is not in the public interest, and retains the ability to hear any disputes regarding the six-month review. The Commission may conduct joint reviews with other states. Any changes at the six-month review pursuant to this section shall apply to and modify this agreement between Qwest and CLEC.*

*16.1.1 To limit the potential for increased liability due to changes in the PAP, Qwest shall be allowed to limit its liability for changes made pursuant to the six-month review. Accordingly, Qwest shall calculate, separately, payments owed under the PAP that do not include changes made at the six month review (baseline PAP), as well as payments owed under a PAP revised to reflect changes made at the six month review (revised PAP). If payments calculated under the revised PAP are more than 110% of payments calculated under the baseline PAP, Qwest shall limit payments for the changed measurements to the affected LECs and to the Special Fund to a 10% increase (10% collar) above the total baseline PAP payment liability. At any six-month review, if the total payment liability for the revised PAP is below 110% of the total payment liability for the baseline PAP for the preceding six-month period, the revised PAP shall become the baseline PAP for the next six-month period, otherwise, the same baseline PAP shall remain in effect for the next six-month period.*

*16.2 Two years after the effective date of the first Section 271 approval by the FCC of one of the states that participated in the multi-state QPAP review proceeding, the Commission may conduct a review by an independent third party to examine the continuing effectiveness of the PAP as a means of inducing compliant performance. This review shall not be used to open the PAP generally to amendment, but would serve to assist the Commission in determining existing conditions and reporting to the FCC on the continuing adequacy of the PAP to serve its intended functions. The Commission may conduct a joint review with other states.*

In its May 8, 2002 Reply to AT&T's Response to Qwest's Supplemental Memorandum, Qwest offered some language as an additional subsection to QPAP section 16. The language was acceptable to AT&T and the NDPSC and we recommend the following be added:

*Notwithstanding section 16.1, if any agreements on adding, modifying or deleting performance measurements as permitted by section 16.1 are reached between Qwest and CLECs participating in an industry Regional Oversight Committee (ROC) PID administration forum, those agreements shall be incorporated into the QPAP and modify the agreement between*

*CLEC and Qwest at any time those agreements are submitted to and approved by the Commission, whether before or after a six-month review. Any changes made pursuant to this section shall be subject to and included in the calculation and application of the 10% payment collar identified in section 16.1.*

The NDPSC finds that Qwest, in its North Dakota SGAT Sixth Revision dated May 30, 2002, has made the changes to QPAP Sections 16.1, 16.1.1, and 16.2 and has added a QPAP Section 16.3 to include the language offered by Qwest in its Reply to AT&T's Response to Qwest's Supplemental Memorandum. Qwest has added the language recommended by the NDPSC.

### ***b. Monthly Payment Caps***

Several CLECs expressed concern over QPAP Section 13.9 provisions that allow Qwest to place Tier 1 payments that exceed a monthly cap in escrow, and to ask for relief from the obligation to pay such amounts.

The facilitator determined that except for the problem of a CLEC that first experiences deficient performance late in the year, which was addressed under the subject of *Procedural Caps* earlier in this report, there is no reason under the QPAP for calculating or using monthly caps. The facilitator recommended there should be no other reference to the calculation or use of monthly caps in the QPAP.

The NDPSC agrees with the facilitator's recommendations regarding monthly payment caps.

### ***c. Sticky Duration***

Z-Tel proposed that base payment levels should escalate if Qwest, after suffering an initial episode of non-compliance, should suffer a second or third episode of similar magnitude, and thereafter should not drop back to the base level after a following month of compliant performance. Qwest argued that the QPAP already contains measures that would, unlike the Texas plan, keep payments for long-term problems from dropping to initial levels based on merely one month of acceptable performance. As payments step up gradually over time, so would they step down, only gradually, after performance improves. Under Qwest's QPAP, payment levels de-escalate after a certain period of corrected performance.

The facilitator determined the Z-Tel proposal was inappropriate because it would ignore entirely successful performance by Qwest however long Qwest provided it. The proposal could produce payments by Qwest that are an order of magnitude higher than those contemplated by the QPAP for Qwest's financial exposure before Z-Tel's amendment.

The NDPSC agrees with the facilitator's recommendation regarding sticky duration.

#### ***d. Low Volume Critical Values***

The QPAP reflects a statistical approach that came from a partial agreement at the PEPP collaborative to alter the default critical value from 1.65 to 1.04 for a number of small-volume measures, and to increase it to varying levels above 1.65 for progressively larger volume measures. Z-Tel and WorldCom argued at the QPAP workshop that the lower value of 1.04 should apply to all low volume measures, not just to the subset of them to which the QPAP would subject to the 1.04 value. Qwest said the PEPP collaborative reached a statistical methods agreement that was designed to balance the impact of the changes that benefited each side. Qwest said the Z-Tel proposal would destroy this balance.

The facilitator said that no participant disputed the fact that the modified statistical approach at the PEPP collaborative was reached in major part to balance out, in terms of numbers of measures, cases where the value to be used increased from 1.65 with cases where the value to be used was reduced from 1.65. Z-Tel seeks to apply theory to adjust a decision reached through compromise. The facilitator recommended there was no reason to upset the balanced, compromise approach that met with substantial agreement at the PEPP collaborative.

The NDPSC agrees with the facilitator's recommendation regarding low volume critical values.

#### ***e. Applying the 1.04 Critical Value to 4-Wire Loops***

The QPAP excludes 4-wire loops from the 1.04 critical value compromise, but it includes DS-1 loops. AT&T said that it always understood the agreement reached at the PEPP collaborative to include 4-wire loops. Qwest objected to AT&T's request saying that 4-wire loops were clearly excluded from the PEPP agreement; were considered analogous to DS-1 loops; and are not always used at the DS-1 level.

The facilitator found that the agreement at the PEPP collaborative was to apply the 1.04 critical value to various types of high-value services. Four-wire loops could be used at DS-1 levels or they could not. Unlike loops provisioned by Qwest with the capability to provide DS-1 services, 4-wire loops take after-the-fact action by CLECs to make them DS-1 capable. Qwest has neither knowledge nor control over these actions. There is no evidence to assume that all (or the overwhelming majority) of the 4-wire loops are made DS-1 capable by CLEC additions of electronics to them. The facilitator recommended the PEPP agreement should be read as excluding 4-wire loops. Furthermore, the facilitator found there was no sound reason shown for adding 4-wire loops because their addition would either impose undue QPAP administration requirements or require an unsound assumption that all 4-wire loops are DS-1 loops.

Should there later be clear and convincing evidence during application of the QPAP's amendment procedures that such use is made of 4-wire loops in excess of 75 percent of such loops leased as UNEs, the issue should be reconsidered.

The NDPSC agrees with the facilitator's recommendations regarding application of the 1.04 critical value to the 4-wire loops.

#### ***f. Measures Related to Low Volume, Developing Markets***

Section 10.0 of the QPAP has been designed to provide a minimum level of compensation in developing markets. The section provides for minimum payments of at least \$5,000 per month for non-compliant service in cases where aggregate CLEC volumes are between 11 and 99. Z-Tel and Covad proposed to replace the aggregate payment to all CLECs with a minimum payment to individual CLECs for individual measures. Covad also argued that all xDSL products can be considered to be low volume by comparison with POTS/voice grade lines, thus making the inclusion of all xDSL sub-measures self-evidently appropriate. Qwest responded that applying the Covad/Z-Tel proposal on such a widespread basis would change the QPAP provision from a market-development inducement to a preference for CLECs with small volumes operating even in mature markets. Responding to Covad's recommendation to add other xDSL products, Qwest said they are included in other parts of the QPAP, and there are many services that CLECs could purchase for use in providing users with xDSL services without Qwest knowing about it.

The facilitator determined that aggregating CLEC volumes under Section 10 keeps the provision focused on developing markets. Making minimum payments to individual CLECs based on their individual order volumes would extend its applicability to small CLECs operating in very well developed markets. This will be addressed in the following *Minimum Payments* section of the report. The facilitator recommended that Qwest's design for Section 10 is an appropriate method for providing Qwest with an added incentive to perform in developing markets and that Qwest's designation of DSL products covered is adequate for the purpose of the section.

The NDSPC agrees with the facilitator's recommendation regarding measures related to low volume, developing markets.

#### ***g. Minimum Payments***

WorldCom commented that small order counts would not produce significant payments by Qwest. WorldCom therefore recommended a \$2,500 per occurrence minimum payment, with escalation based on these minimums. Qwest objected to WorldCom's minimum proposal as not relating to small CLECs, on grounds that it would apply regardless of CLEC size or order volumes. Qwest also objected to the resulting application of the QPAP's escalation provisions to the minimum payment amounts.

WorldCom agreed that it would be appropriate to limit its proposed minimum payments to CLECs with monthly volumes of less than 100 occurrences.

The facilitator determined that minimum payments to CLECs with very small order numbers might be appropriate because they suffer harm out of proportion to the number of their orders. Thus, the facilitator determined it would be appropriate to set an annual minimum payment that is a function of the number of months in which Qwest fails to meet performance standards. The facilitator determined a minimum payment of \$2,000 is more appropriate than that proposed by WorldCom and should be applied per month for each month in which Qwest missed any measure applicable to such CLECs. The minimum payment should not be applied on a per measure basis. The minimum payment should also account for months in which volumes are more substantial in order to assure that order placement is not influenced by month-end considerations. All QPAP payments to such CLECs for that month should count against the minimum. The facilitator recommended the QPAP should therefore provide as follows:

*For each CLEC with annual order volumes of no more than 1200, Qwest shall perform at the end of each year a minimum payment calculation. Qwest shall multiply the number of months in which at least one payment would be required to such CLEC by \$2,000. To the extent that actual CLEC payments for the year are less than the product of the proceeding calculation, Qwest shall make annual payments equal to the difference.*

The NDPSC agrees with the facilitator's recommendation regarding minimum payments and finds that Qwest has made the recommended revision to the QPAP at Section 6.4.

#### ***h. 100% Caps for Interval Measures***

The QPAP contains a number of provisions that are intended to provide payments on the basis of the number of occurrences that fail to meet standards. The payment structure in the QPAP increases Qwest's payment liabilities as a function of how far Qwest's performance has deviated from the standard and the volume of CLEC transactions. The QPAP limits Qwest's liabilities once difference between Qwest's performance to itself (retail performance) and performance to CLECs reaches 100%.

CLECs assert there should be no cap on payment liabilities as the divergence (severity) between its performance for itself and its performance for CLECs increases.

The CLECs proposal recognizes the severity of diverging performance as an average of the divergence of all occurrences.

The facilitator reasoned that an appropriate quantification of severity should recognize the severity of each individual occurrence rather than the average severity of a set of occurrences. The facilitator found that there is no factual or logical basis for believing that the CLEC's proposal comes closer to ultimate reality than the method in

the QPAP. It appears to the NDPSC that both Qwest's and the CLECs' proposal rely upon averages in the measure of severity.

The facilitator reasoned that methods like those proposed in the QPAP exist in other plans examined by the FCC and did not recommend changes to the QPAP. The facilitator recommended that any distribution information and any recommended QPAP changes resulting from it should be open to consideration during plan amendment processes. AT&T noted that the FCC has approved performance assurance plans with and without a cap on the percentage difference calculation for performance measurements expressed as averages or means.

The NDPSC recommends that the QPAP provision for a 100% cap for interval measures be retained.

#### ***i. Assigning Severity Levels to Percent Measures***

Z-Tel argued that the severity of the consequences of missing a standard expressed as a percentage differs according to what the standard is. Z-Tel proposed a payment formula that would make compensation more proportional to the relative size of the "miss" involved. Qwest presented an analysis to support its claim that the Z-Tel proposal could provide exorbitant payments to CLECs.

The facilitator determined that although there may be merit in Z-Tel's concept for assigning severity levels, the PEPP collaborative negotiated payment amounts did not use this formula and applying it now would have the effect of significantly increasing payment amounts. The facilitator determined it would be inappropriate to graft the Z-Tel formula as proposed onto base payment amounts negotiated in the collaborative. The forum for addressing QPAP changes on an ongoing basis should consider whether there are means for introducing the correlation Z-Tel seeks between payments and severity of misses, without unduly altering the total payment expectations that came out of the PEPP collaborative process. The facilitator recommended the Qwest proposal for the present provides an adequate means to detect and sanction poor performance in meeting measures expressed as percentages. For the future, QPAP review and amendment procedures will provide a suitable place for full debate about and consideration of a more adequately defined Z-Tel formula.

The NDPSC agrees with the facilitator's recommendation regarding assigning severity levels to percent measures.



#### **4. Self-Executing Mechanism**

##### ***a. Dispute Resolution (Section 18)***

Qwest's brief added a dispute resolution provision specifically applicable to the QPAP. It would allow the general SGAT dispute resolution provisions to apply, but only in the event of disputes arising under QPAP sections 13.3, 13.3.1, 13.7, 13.9, 15.1, 15.2, and 15.9. Some CLECs requested that all QPAP disputes should be resolved under the provisions of the SGAT. AT&T requested that the Texas plan language replace what Qwest proposed, and that the dispute resolution provision would apply to all the QPAP.

The facilitator determined there was no reason why the general SGAT dispute resolution sections are any less suitable for addressing QPAP provisions beyond those listed by Qwest. The facilitator further recommended it should be clear that the dispute resolution provisions of the SGAT apply to QPAP disputes involving CLECs who use the SGAT in its entirety or act to make the QPAP part of their interconnection agreements. The facilitator determined the AT&T recommendation should not be accepted because the Texas agreement refers to dispute resolution procedures that are a function of the Texas Commission procedural rules.

The NDPSC agrees with the facilitator's recommendation and finds that Qwest has made the recommended revisions to the QPAP at Section 18.0.

##### ***b. Payment of Interest***

The QPAP did not provide for interest on late PAP payments. Qwest agreed that interest at the one-year Treasury rate would be appropriate on late payments, provided that the same rate would apply to overpayments and to underpayments. AT&T recommended that each state's statutory interest rate be inserted in lieu of the one-year Treasury rate, which AT&T said was likely to be low.

The facilitator determined that Qwest's proposal fell short by applying the United States Government's cost of money, when the value that must be replaced is that of commercial telecommunications entities. The facilitator recommended the QPAP should provide for interest at a prime rate published daily by one of the services or publications respected in the industry for any payments made after the date due for any reason.

The NDPSC agrees with the facilitator's determination and finds Qwest has included the recommended revision at Section 11.1 of the QPAP for interest at the prime rate as reported in the Wall Street Journal.

### ***c. Escrowed Payments***

Covad objected to allowing Qwest to avoid current payment obligations by claiming exclusions. Covad argued that Qwest should either have to pay pending dispute resolution or make payments to an interest bearing escrow account. Having agreed to pay interest, Qwest objected to being required to place funds in escrow pending dispute resolution.

The facilitator recommended that the provision for payment of interest resolves the issue of the time value of money because there is not at present a need for concern about credit-worthiness in the case of Qwest. The facilitator recommended, however, there would be some potential benefit in including a provision that would allow a party to require the other to make payments into escrow where the requesting party can show cause, perhaps on grounds similar to those provided by the Uniform Commercial Code, in cases of commercial uncertainty.

The NDPSC agrees with the facilitator's recommendation and finds that Qwest has made the recommended change to the QPAP at Section 13.3.1.

### ***d. Effective Dates***

#### ***(i) Initial Effective Date***

AT&T and WorldCom ask that the QPAP become effective when a Public Service Commission issues its consultative report. Qwest proposed that the QPAP be effective state-by-state as of the date when Qwest may receive FCC 271 approval in each state. Some of the CLECs replied that the Commission should require monthly reports of payments that would have resulted under the QPAP, had it been in effect earlier than 271 approval.

The facilitator determined the relevant issue at hand is not whether commissions can implement the QPAP under their own authority, but rather whether commissions should tell the FCC that they consider the QPAP sufficient to meet the public interest standard even if it is not made effective prior to FCC approval of a 271 application. The reason cited by the FCC in support of the adoption of a PAP is the need for assurance that local exchange markets will remain open after Qwest may receive authority to provide in-region interLATA service. It is logical to conclude that the QPAP should become effective state-by-state as of the date when Qwest may receive FCC 271 approval, absent special circumstances. The facilitator recommended that Qwest should report performance and presumed payment levels between now and any grant of 271 approval to provide focus to the interim performance information. The facilitator therefore recommended that Qwest should provide monthly QPAP reports as if the QPAP had become effective on October 1, 2001.

The NDPSC agrees with the facilitator's recommendations regarding effective dates and finds that Qwest has begun to file the recommended monthly reports.

***(ii) "Memory" at Initial Effective Date***

AT&T said that when the QPAP becomes effective it should effectively calculate performance for as many prior months as are necessary to provide that escalated, rather than baseline, payments apply from the first month. Qwest said this proposal is no different conceptually from one recommending the imposition of the QPAP's payment requirements before 271 approval.

The facilitator recommended that, having determined that the QPAP should be limited to performance post-dating Section 271 approval and that other remedies apply before that time, it would be inappropriate to start the QPAP payment structure "mid-stream."

The NDPSC agrees that a "memory" provision should not be included at the initial effective date of 271 approval or at the date the CLEC adopts the PAP and therefore recommends no changes to the QPAP on this issue.

***(iii) PAP Effectiveness if Qwest Exits InterLATA Market***

Some of the CLECs argued that QPAP payment obligations should continue if Qwest exists the in-region interLATA market.

The facilitator determined that for the same reasons that the QPAP should only be effective upon entry by Qwest into that market, it should terminate upon the end of Qwest's authority to serve that market.

The NDPSC agrees with the facilitator's recommendation.

***e. QPAP Inclusion in the SGAT and Interconnection Agreements***

WorldCom said that Qwest failed to address the question of how the QPAP should be made a part of the SGAT, which requires Commission consideration of the issue.

The facilitator recommended that Qwest's 10-day comments address the SGAT context for the QPAP and the scope of what a CLEC with an interconnection agreement would be required to elect. Qwest reported in its comments that the QPAP will become Attachment K to the SGAT. If a CLEC wants to opt-in to the QPAP, it would do so by an amendment to its interconnection agreement.

The NDPSC agrees with Qwest's comments regarding the inclusion of the QPAP in the SGAT and interconnection agreements.

#### ***f. Form of Payments to CLECs***

The QPAP provides for QPAP payments to be made by bill credit, rather than by cash or check. Some of the CLECs recommended that QPAP payments be made by cash or check. Payments to the state would be made via check or wire transfer.

The facilitator found that CLEC arguments about the administrative convenience of requiring payment by the equivalent of cash were not persuasive. It would be inappropriate to require Qwest to make payments to CLECs in cases where CLECs were not current in paying Qwest for the same kinds of services. The facilitator determined the QPAP provision is appropriate as it provides for a cash equivalent transfer when there is not a sufficient CLEC amount due to offset the credit. The crediting approach applies to the bills issued under the SGAT or interconnection agreement. Any other arrangements between Qwest and a CLEC must be addressed in the terms of those agreements, not the QPAP. If an agreement covering different services allows offset rights that would extend to the QPAP, the provisions of that agreement would apply. The facilitator recommended the QPAP should require Qwest to provide credit information in substantially the form of the sample it provided as Exhibit S-9-QWE-CTI-4, absent Commission consent to change it.

The NDPSC agrees with the facilitator's recommendation regarding the form of payment to CLECs and finds that Qwest has made the recommended addition to the QPAP at Section 11.2. The NDPSC finds that payments to the State of North Dakota be made via check.

### **5. Assurance of the Reported Data's Accuracy**

#### ***a. Audit Program***

Qwest said that it modeled the QPAP audit provisions after the Texas plan, and that it included the concept of risk-based auditing as proposed in the report by Liberty Consulting Group recommending the adoption of an ongoing monitoring program. The QPAP includes audits triggered by measurements that change from manual to mechanized techniques and audits of measurements that have a high degree of risk. Such measurements would be identified by the auditor and would be scheduled for audit over a two-year cycle. Qwest sought the right to select the auditor in order to assure consistency of results and efficiency in the conduct of the audit program across its 14 state region.

Qwest argued that CLEC-initiated audits should be subject to limitation and that their costs should not be chargeable to Qwest in the absence of audit findings that would raise material concerns. Qwest proposed to limit CLEC initiated audits to two per year, with each audit covering no more than two performance measures. Qwest also proposed that CLEC initiated audits be performed by the same auditor selected to

perform the risk-based auditing to which Qwest agreed. Qwest opposed recommendations that it should bear at least half of all CLEC audit costs, regardless of whether the audit finds material deficiency. Qwest also opposed a recommendation of Covad for audits for all "high" weighted QPAP measures that Qwest has failed regularly to meet.

Qwest argued it should retain the internal control to manage the processes that it uses to make performance measurements. Qwest said its change management governance process includes strict controls and that it will post to an external website material changes affecting the processes, methods, and activities related to producing performance measurements and reports.

AT&T and WorldCom proposed elimination of the restrictions on the number of special audits that CLECs could request. AT&T would also limit the authority of Qwest to request audits of CLEC data and also deemed it inappropriate to disallow overlaps in CLEC requested audits. AT&T and WorldCom argued that allowing Qwest the right to select an independent auditor was inconsistent with the need for independence. WorldCom recommended that CLECs be allowed to request additional audits conducted by the commissions as well as when CLECs can show cause for an audit. Finally, WorldCom also recommended a collaborative, multistate audit program, and objected to any provision that would limit Public Service Commission powers to request performance-measure audits.

The facilitator concluded that the QPAP provides some of the key elements of a sound audit program but fails to create an effective and efficient overall program that will provide adequate assurances of the continuing accuracy of underlying performance data. It suffers from certain gaps that would make it unreasonably difficult to identify potential changes of consequence, it does not assure continuing attention to data accuracy indefinitely out in the future, and it provides Qwest a degree of control over the program that is not fully consistent with the need for complete independence of the data auditing and testing program. The facilitator proposed the adoption of an integrated program in response to these concerns. The facilitator recommended there should be a process for brief, regular meetings between Qwest and the independent auditor to allow Qwest, without the presence of other parties, to report on and the auditor to ask questions about changes made in the Qwest management regime. The auditor would produce reports from these meetings to the commissions, and where the commissions deem it appropriate, other participants. Results of the meetings would permit the auditor to make an independent assessment of the materiality and propriety of any Qwest proposed change, including, where necessary, testing of the change details by the auditor.

With respect to auditing and testing, Qwest accepted the two-year planning cycle proposed by Liberty as part of its performance measures audit. Liberty's recommended approach contemplated the adoption of a formal plan identifying the specific aspects of performance measurement to be tested, the specific tests to be conducted, and the

entity to conduct them. Central to the plan's cyclical approach is that higher risk areas should be audited more frequently, but that even lesser causes of risk should be periodically tested. Each two-year cycle would examine the risk likely to exist across the period and the past history of testing, in order to determine what combination of high and more moderate areas of risk should be examined. The first year of each successive cycle should concentrate on areas most likely to require follow-up in the second year. Cycle planning should be conducted under the auspices of the participating commissions, with detail planning recommendations to be made by an outside auditor retained for two-year periods. The participating commissions should select the auditor because one of the auditors' tasks will be to recommend the assignment of cost responsibility for CLEC-requested audits. Furthermore, assuring both the reality and the appearance of independence in the auditor's test work calls for retention by the commissions, who should be considered the clients for whom the test work is performed. The auditor should also assess the need for individual audits proposed by CLECs. These audits should be available for CLEC specific concerns or issues not otherwise addressed by the plan for the current cycle. The independent auditor should review CLEC requests for audits, with dispute resolution available to any party questioning the auditor's recommendation. Absent dispute, the auditor would carry out any CLEC-requested audits whose need the auditor accepted; the parties could ultimately accept or challenge results or the determination of need for the audit through available dispute resolution methods. The auditors' task should include determining general applicability of findings and conclusions, magnitude of any payment adjustment, and cost responsibility for the test performed, with the test being the materiality and clarity of any Qwest non-conformance with measurement requirements. The states can address their individual needs during the planning process, and they can commission additional testing in the event that a commonly derived plan fails to meet their needs.

The NDPSC finds that Qwest has included the facilitator's recommendations for the audit provisions in QPAP Section 15 while funding for the audit program is included in QPAP Section 11.3. The NDPSC agrees with the facilitator's recommendation that state commissions be able to join with other states to oversee the QPAP auditing function in a manner that allows each state to act independently on issues where it might differ from other states. However, the NDPSC believes that it should be able to perform those functions on its own or in the absence of a multistate oversight body.

The NDPSC recommends the following language for QPAP Sections 15.1 through 15.4:

*15.1 Audits of the PAP shall be conducted in a two-year cycle under the auspices of the Commission in accordance with a detailed audit plan developed by an independent auditor retained for a two-year period. The Commission shall select the independent auditor with input from Qwest and CLECs.*

15.1.2 The initial audit plan shall be conducted over two years, with audit periods subsequent to the initial audit to be determined by the Commission. The Commission will determine the scope of and procedure for the audit plan, which, at a minimum, will identify the specific performance measurements to be audited, the specific tests to be conducted, and the entity to conduct them. The initial audit plan will give priority to auditing the higher risk areas identified in the OSS report. The two-year cycle will examine risks likely to exist across that period and the past history of testing, in order to determine what combination of high and more moderate areas of risk should be examined during the two-year cycle. The first year of a two-year cycle will concentrate on areas most likely to require follow-up in the second year.

15.1.3 The Commission will attempt to coordinate its audit plan with other audit plans that may be conducted by other state commissions so as to avoid duplication. The audit shall be conducted so as not to impede Qwest's ability to comply with the other provisions of the PAP and should be a nature and scope that it can be conducted with the reasonable course of Qwest's business operations.

15.1.4 Any dispute arising out of the audit plan, the conduct of the audit, or audit results shall be resolved by the Commission.

15.2 Qwest shall carefully document any and all changes that Qwest makes to the Performance Measurement and Reporting System. This change log shall be displayed on a public website dedicated to the QPAP. The Performance Measurement and Reporting System is defined to include at least: elements of Qwest's Regulatory Reporting System that constitute the data collection programs (i.e., the software code used by Qwest to determine which data fields are used and how they are used), the underlying data extracted by the data collection programs and data reference tables (e.g., USOC tables, wire center tables, etc., used in the calculation of measurements), the data staging programs (programming code used to organize and consolidate the data), the calculation programming (the code used to implement the formula defined for a measurement), and the report generation programs (including the report format and report file creation). This change log shall contain, at a minimum, a detailed description of the change (in plain English); the effects of the change, the reason for the change, the dates of notification and of implementation, and whether the change received Commission approval. Qwest shall also record if the change is fundamental or non-fundamental (see Sections 15.2.1 and 15.2.2).

15.2.1 Qwest shall be allowed to change the Performance Measurement and Reporting System as defined in Section 15.2 in ways that are non-fundamental (i.e. system changes for which the relevant performance data can be replicated under the old approach) without preapproval, but shall

*promptly record these changes on the change log. Omitted or inaccurate changes to the change log shall result in Qwest being required to pay a \$250 fine, plus interest at the prime rate as reported in the Wall Street Journal accrued from the time the change took effect. The payment shall go to the Tier 2 ND Performance Assurance Fund and does not count against the annual cap described in QPAP Section 12.*

*15.2.2 Before making any changes to the Performance Measurement and Reporting System in a manner whereby the relevant data cannot be reconstructed under the prior approach (i.e., a fundamental change to its measurement system), Qwest shall record the proposed change to the change log and notify the Commission staff and the Auditor retained for the purpose of auditing performance measurements under this QPAP to request an evaluation of the proposed change. The Commission staff or the Auditor will evaluate the impact of the proposed change and report, in writing, the results of that evaluation to the Commission and Qwest. Qwest shall immediately post this report on the public QPAP website. Upon receiving the report of the impact evaluation from the Commission staff or the Auditor, the Commission shall have 15 days to take action to prevent Qwest from making such a change and to decide on a process for resolving the issue. During the first seven-day period following the filing and recording of the Commission staff or Auditor's report, interested parties may file comments on the proposed change and the report. If the Commission takes no action on the issue during the 15-day period, Qwest shall be free to make the proposed change.*

*15.2.3 If Qwest makes a fundamental change pursuant to Section 15.2.2 without obtaining approval, it shall be liable for \$10,000 payable to the ND Performance Assurance Fund. If Qwest cannot reproduce reliable performance data, the Commission shall determine what payments are due based upon the data collected by the affected CLECs plus interest at the prime rate as reported in the Wall Street Journal accrued from the time the change took effect.*

*15.3 In the event of a disagreement between Qwest and CLEC as to any issue regarding the accuracy or integrity of data collected, generated, and reported pursuant to the PAP, Qwest and the CLEC shall first consult with one another and attempt in good faith to resolve the issue. If an issue is not resolved within 45 days after a request for consultation, CLEC and Qwest may, upon a demonstration of good cause, (e.g., evidence of material errors or discrepancies) request an independent audit to be conducted, at the initiating party's expense. The independent auditor will assess the need for an audit based upon whether there exists a material deficiency in the data or whether there exists an issue not otherwise addressed by the audit plan for the current cycle. The Commission will resolve any dispute by any party questioning the independent auditor's*



*decision to conduct or not conduct a CLEC request audit and the audit findings, should such an audit be conducted. An audit may not proceed until dispute resolution is completed. Audit findings will include: (a) general applicability of findings and conclusions (i.e., relevance to CLECs or jurisdictions other than the ones causing test initiation), (b) magnitude of any payment adjustments required and, (c) whether cost responsibility should be shifted based upon the materiality and clarity of any Qwest non-conformance with measurement requirements (no pre-determined variance is appropriate, but should be based on the auditor's professional judgment). CLEC may not request an audit of data more than three years from the later of the provision of a monthly credit statement or payment due date.*

*15.4 Expenses for the audit of the PAP and any other related expenses, except that which may be assigned under section 15.3, shall be paid first from the Tier 2. If Tier 2 funds are not sufficient to cover audit costs, the Commission will develop an additional funding method, which may include contributions from CLEC's Tier 1 payment.*

The NDPSC finds that Qwest, in its North Dakota SGAT Sixth Revision dated May 30, 2002, has made the changes to QPAP Sections 15.1 through 15.4.

#### ***b. PSC Access to CLEC Raw Data***

QPAP Section 14.2 authorizes Qwest, upon Commission request, to provide CLEC raw data to the Commission. Qwest said it would be inefficient for commissions to follow the CLEC approach, which would be to ask the CLECs directly for the information. AT&T asked that Section 14.2 be stricken from the QPAP because there is not provision for maintaining confidentiality.

The facilitator determined the Commission has legitimate need for the data at issue. There is no sound reason for requiring them to undertake the potentially significant burdens of seeking it from individual CLECs. Each state has existing procedures for the treatment of confidential information. The facilitator recommended the following language should be inserted into the QPAP to address confidentiality of the data:

*Pursuant to terms of an order of the Commission, Qwest may provide CLEC specific data that relates to the QPAP, provided that Qwest shall first initiate any procedures necessary to protect the confidentiality and to prevent the public release of the information pending any applicable Commission procedures and further provided that Qwest provides such notice as the Commission directs to the CLEC involved, in order to allow it to prosecute such procedures to their completion.*

The NDPSC agrees with the facilitator's recommendations regarding Commission access to CLEC raw data and finds that Qwest has added the recommended language to QPAP Section 14.2.

***c. Providing CLECS Their Raw Data***

AT&T recommended a deadline of two weeks from a CLEC's request for Qwest to provide a CLEC with its specific data relevant for QPAP measurement and payment purposes. Qwest argued that AT&T's proposal that Qwest be obligated to provide the data to CLECs on a firm schedule would fail to respond adequately to the factors that could materially affect the time in which it could reasonably be provided. Covad said that it requires the computer code and process information underlying CLEC data in order to reconcile its performance measurements with those of Qwest. Qwest opposed AT&T's and Covad's proposals involving Qwest's website for posting CLEC-specific results and data, arguing that its proposal should be considered purely voluntary because no other BOC has been obliged to offer such a capability. WorldCom asked that Qwest be required to maintain electronic access to underlying records for three years, and to keep records in an archived state for an additional three years.

The facilitator determined Qwest should be obligated to provide data as soon as it feasibly can. More specific deadline language would not respond to the need for flexibility given the size or nature of the requests that Qwest may face. The facilitator further determined the QPAP should allow payments to be recalculated retroactively for three years and it should require Qwest to retain sufficient records to demonstrate fully the basis for its calculations for long enough to meet this potential recalculation obligation. Thus, it is sufficient to require Qwest to maintain the records in a readily useable form for one year; it is sufficient if the remainder of the required records were maintained in archived format. The facilitator determined that while the use of a website may prove useful, there is no evidence to support a conclusion that it is the only acceptable way, or that it would even provide significant advantages over other methods. Covad's request for a computer code and process information is overly broad. The QPAP, however, should include a provision providing that Qwest's distribution of CLEC-specific data must be in a form that would allow CLECs to be able to identify its nature and content, and will be in a form to allow CLECs to undertake the same types of calculations performed by Qwest.

The NDPSC agrees with the facilitator's recommendations regarding providing CLECs their raw data and finds that Qwest has made the recommended revisions to the QPAP at Sections 14.2 and 14.4.

***d. Late Reports***

WorldCom proposed a payment schedule for late, incomplete, and incorrect reports. Other CLECs also proposed payment schedules for such reports. Qwest

defended the QPAP Section 14.3 per-day late report payment of \$500 as providing sufficient incentive to report on time, after considering the number of states for which payments would be required and the relationship between payment amounts and the number of days that reports are late.

The facilitator determined that requiring payments for inaccurate reports is troublesome. The QPAP consists of a vast number of measures; and it is not realistic to expect that no report would ever contain a measure that will later require restatement. A better way to deal with the accuracy of reports is to include the issue of report accuracy into the risk analysis that will be used to formulate audit plans. Similarly, liquidated payments for an inability to meet deadlines for providing a CLEC with its specific data are not warranted. The auditing program should consider CLEC-specific and CLEC-aggregate data in its planning. Regarding payment levels, the facilitator recommended that the payments in the QPAP are sufficient to deal with small delays, but should escalate over time. Recognizing the QPAP already includes a grace period of one week, the facilitator recommended payments should escalate as follows: second week reports -- \$500 per day; third week reports -- \$1,000 per day; and subsequent week reports -- \$2,000 per day. The facilitator found that Qwest remains protected against undue growth in payments by virtue of its ability to seek a waiver of late-report payments.

The NDPSC agrees with the facilitator's recommendation and finds Qwest has included the revisions implementing late report payment provisions in QPAP Section 14.3.

## **6. Other Issues**

### ***a. Prohibiting QPAP Payment Recovery and Rates***

AT&T argued there should be specific language precluding QPAP recovery in rates. Qwest said that such language is not necessary, because the FCC has already made it clear in prior 271 orders that QPAP payments may not be recovered in interstate rates and noting that the New York Commission had made a similar determination at the state level.

The facilitator determined QPAP language was not necessary on this issue because neither the FCC nor the state commissions require guidance in how or when to determine what to do about QPAP payment recovery in rates.

In North Dakota, Qwest's prices for essential services are subject to price factor regulation. Under price factor regulation, Qwest is permitted to fully reflect in any price for those services all increases or decreases in governmentally imposed surcharges and any financial impact on cost of essential telecommunications services caused by governmentally imposed changes in taxes, accounting practices, or separations

procedures. The NDPSC recommends that Qwest add language to the QPAP in North Dakota confirming that it will not attempt to recovery in intrastate rates, payments made under the QPAP.

The NDPSC finds that Qwest, in its North Dakota SGAT Sixth Revision dated May 30, 2002, has made this commitment in QPAP Section 13.10.

#### ***b. No-Admissions Clause***

Some CLECs argued that measurements under the PID and payments based on them should be admissible in evidence in other proceedings. They recommended deletion of QPAP Section 13.4.1.

The facilitator determined that Section 13.4.1 restrictions apply only to the existence of the QPAP and to the making of payments thereunder. They do not apply to use of the objective information set forth in the performance reports to show what Qwest's performance actually was. Given the multiple purposes of the QPAP and given the availability of the underlying performance data for use as evidence, the facilitator recommended that Section 13.4.1 constitutes a reasonable approach.

The NDPSC agrees with the facilitator's recommendation.

#### ***c. Qwest's Responses to FCC-Initiated Changes***

Qwest cited three proposed QPAP changes that Qwest said came from informal FCC input and that Qwest noted were not objected to or commented upon at the hearings on the QPAP. Those changes included eliminating two families of OP-3 sub-measures so no missed order would go uncompensated; removing the adjustment for commission rate orders, which adjustments had the effect of reducing the total amount of risk under the QPAP; and making two changes in the statistical values used to test Tier 2 parity measurements.

Because there was no objection to these changes by any participant, the facilitator recommended they should be incorporated into the QPAP.

The NDPSC agrees with the facilitator's recommendations and finds that Qwest has modified the Attachment 1 to reflect the OP-3 family "removal"; removed adjustments for commission rate orders in CAP calculations reflected in QPAP Section 12.1; and reflected the statistical change to the Tier 2 parity measures in Sections 7.2 (i.e., applications of 1.645 critical value for all parity measures except MR-2 and OP-2).

#### ***d. Specification of State Commission Powers***

Section 12.3 of the QPAP provides that a state commission may recommend to the FCC that Qwest be prohibited from offering in-region interLATA services to new customers in the event the annual cap is reached.

The facilitator determined that, apart from the QPAP, commissions may recommend such relief for innumerable reasons other than the fact that Qwest reaches the cap. The facilitator found this section utterly valueless in providing commissions with any power that they do not already possess. The facilitator recommended the provision should be stricken in order not to cloud the legitimacy of or weight to be given any future commission action other than the ones cited in the QPAP.

The NDPSC agrees with the facilitator's recommendation and finds that Qwest has removed the provision from Section 12.3.

#### **C. Conclusion**

The NDPSC recommends that Qwest's Performance Assurance Plan be found in the public interest.